Court of Appeals, State of Michigan

ORDER

Karen M. Fort Hood
Presiding Judge

Greg B Schankin v Saddle Lane Homeowners Association

Richard A. Bandstra

Docket No. 243187

LC No. 98-001016 CZ

Patrick M. Meter
Judges

On the Court's own motion, the March 16, 2004, unpublished per curiam opinion is hereby AMENDED to correct a clerical error.

Page Five, Paragraph 4, the second full sentence of the slip opinion shall now read:

"Because, as conceded by plaintiffs on appeal, there was evidence and findings made by the trial court to support a conclusion that plaintiffs nevertheless violated ¶10 of the 1970 deed restrictions by using...."

Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

APR 6 2004
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

GREG B. SCHANKIN and BRENDA SCHANKIN,

Plaintiffs/Counterdefendants-Appellants,

v

SADDLE LANE HOMEOWNERS ASSOCIATION,

Defendant/Counterplaintiff-Appellee,

and

JOSEPHINE M. ROEK, THOMAS CARUSO, and KATHY CARUSO,

Defendants.

UNPUBLISHED
March 16, 2004

No. 243187
Macomb Circuit Court
LC No. 98-001016-CZ

Before: Fort Hood, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Plaintiffs/counterdefendants, Greg and Brenda Schankin (hereafter "plaintiffs"), appeal as of right from the trial court's order granting summary disposition in favor of defendant/counterplaintiff, Saddle Lane Homeowners Association (hereafter "defendant"), with regard to plaintiffs' claim that defendant negligently drafted deed restrictions in 1997 for property in plaintiffs' subdivision. Plaintiffs also challenge an earlier decision, following a bench trial, of no cause of action with regard to plaintiffs' action to quiet title and awarding judgment in favor of defendant with regard to its counterclaim for injunctive relief. We reverse in part and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

This case involves a dispute between a homeowners association (defendant) and lot owners (plaintiffs) concerning deed restrictions for the Saddle Lane Subdivision (hereafter "Subdivision 1") in Clinton Township. The original deed restrictions for Subdivision 1 were recorded with the Macomb County Register of Deeds in August 1970, contemporaneously with

the plat for the thirty lots that comprised Subdivision 1. The 1970 deed restrictions were signed by five individual proprietors, Katharina Keller, Calvin and Yvonne Ebersole, and Jerome and Vincenzia Grillo, who also certified the land as having been surveyed, divided, mapped and dedicated, as represented in the plat. Later in 1970, John Ruggero, a witness to the original 1970 deed restrictions, and his wife, Marie Ruggero, executed an amendment to a setback requirement in the 1970 deed restrictions as one hundred percent owners of the lots. The Ruggeros executed a similar amendment in 1971 as owners of more than sixty percent of the lots.

In 1972, the proprietors of land adjacent to Subdivision 1, which included the Ruggeros, established a plat and deed restrictions for nine additional lots in what was described as Saddle Lane Subdivision No. 2 (hereafter "Subdivision 2). In 1980, defendant was incorporated as a nonprofit corporation, with its stated financing to include dues and assessments to be levied on its members. Defendant's membership was open to both Subdivision 1 and Subdivision 2.

In 1994, plaintiffs purchased a home in Subdivision 1. In 1996, a controversy arose between property owners with regard to whether a twenty-four by twenty-four foot structure that plaintiffs were building in their backyard comported with the 1970 deed restrictions. In early 1997, defendant held a meeting at which property owners of both subdivisions were afforded an opportunity to approve amended restrictions for both subdivisions and for defendant's bylaws. After obtaining affirmative votes from the twenty lot owners who attended the meeting, three of defendant's officers signed the 1997 deed restrictions and amended bylaws as a singular document. Defendant also recorded this document with the Macomb County Register of Deeds.

In March 1998, plaintiffs filed the instant action against defendant, challenging the validity of the 1997 deed restrictions, as well as the enforceability of certain provisions in the 1970 deed restrictions, as part of an action to quiet title. Plaintiffs also alleged that defendant was liable in negligence for not properly drafting the 1997 deed restrictions.[1] Defendant filed a counterclaim for injunctive relief, seeking to have a wooden fence and the structure built in plaintiffs' backyard removed on the ground that they violated the 1970 deed restrictions. Defendant later moved for and was granted preliminary injunctive relief with respect to its claim that plaintiffs engaged in new construction, contrary to the 1997 deed restrictions.

Following a bench trial with respect to plaintiffs' action to quiet title and defendant's counterclaim for injunctive relief, the trial court entered a judgment of no cause of action with regard to plaintiffs' action. Defendant was granted injunctive relief under both the 1970 and 1997 deed restrictions. Plaintiffs were permitted to keep their wooden fence, but were ordered to remove the structure in their backyard or, alternatively, submit a plan to an architectural control committee that comported with the 1970 deed restrictions. Plaintiffs were also ordered to fill in an indentation in their front lawn, or submit a plan or request to an architectural control committee that comported with the 1997 deed restrictions.

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[1] Plaintiffs also alleged claims against three individuals, which were dismissed during the course of this action. The dismissal of those claims is not at issue on appeal.

After the bench trial, defendant moved for summary disposition with respect to plaintiffs' negligence claim. Defendant relied on the court's factual findings at the bench trial to argue that summary disposition was proper under MCR 2.116(C)(7) (claim barred) or MCR 2.1116(C)(10) (no genuine issue of material fact). The motion was heard by a different judge and was granted on the ground that there was no genuine issue of material fact with regard to whether defendant breached any duty owed to plaintiffs.

II. 1970 Deed Restrictions

On appeal, plaintiffs raise two issues concerning the trial court's bench trial decision that the structure in their backyard violated the 1970 deed restrictions. We review the trial court's findings of fact for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). We review the trial court's conclusions of law and equitable decision de novo. *Id.*; *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

Plaintiffs first claim that defendant did not have authority to enforce the 1970 deed restrictions because defendant was not a "person" owning real property within the meaning of ¶ 22 of those restrictions. Our review of the trial court's findings, however, reflect that the trial court relied on defendant's articles of incorporation, rather than the 1970 deed restrictions, to conclude that defendant was an entity charged with determining compliance with the 1970 deed restrictions. Because plaintiffs have not briefed this basis of the trial court's opinion, we could decline to consider plaintiffs' claim. See *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001) (an issue given only cursory treatment by a party on appeal need not be addressed by an appellate court).

But because defendant also argues on appeal that the 1970 deed restrictions provide the source for any authority to enforce the 1970 deed restrictions, we shall consider the parties' arguments. Defendant's authority under the 1970 deed restrictions to enforce those provisions is a necessary issue in this case. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Because deed restrictions are grounded in contract, we conclude that the trial court erred by looking to defendant's articles of incorporation to find that defendant was authorized to enforce the 1970 deed restrictions. See *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). The 1970 deed restrictions neither required the formation of a homeowners association nor granted any authority to a homeowners association to enforce its provisions.

Rather, ¶ 22 governs the question whether defendant might enforce the 1970 deed restrictions. Paragraph 22 states:

> If the parties hereto, or any of them or their personal representatives or successors, or their heirs or assigns shall violate or attempt to violate any of the covenants herein, *it shall be lawful for any other person or persons owning any real property situated in said subdivision to prosecute any proceedings at law or in equity* against the person or persons violating or attempting to violate any such covenants and either to prevent him or them from so doing or to request cash damages or other damages for such violation. [Emphasis added.]

We disagree with plaintiffs' position, however, that defendant lacked the authority under ¶ 22 to enforce the 1970 deed restrictions because it was a corporation, not a person. Plaintiffs give an

overly technical or constrained construction to the meaning of "person" in ¶ 22. See *UAW-GM Human Resources Center v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). Contractual language is to be construed as a whole to determine its meaning. *Perry v Sied*, 461 Mich 680, 689 n 10; 611 NW2d 516 (2000). The drafters' intent is controlling when construing deed restrictions. *Stuart, supra*.

Here, the 1970 deed restrictions are inartfully written with regard to the use of the word "person." Paragraph 22 purports to bind "parties," as well as their personal representatives, successors, heirs or assigns, to the 1970 deed restrictions, but then uses the word "person" when addressing who might enforce or violate the 1970 deed restrictions. Paragraph 22 is further inartfully drafted insofar that it uses only the male pronoun "him" or plural pronoun "them" to identify who can be sued for violating the 1970 deed restrictions. But construed as a whole, ¶ 22 fairly admits of but one reasonable interpretation. It applies to both artificial and natural persons, as well as both male and female genders, so long as the ownership requirement is satisfied. Because defendant, as a corporation (artificial person), would fall within the scope of ¶ 22, the dispositive question in this case becomes whether defendant owned "any real property situated in said subdivision."[2]

Clearly, the meaning of "said subdivision" must be read in conjunction with the recorded plat for Subdivision 1 and, therefore, the real property in question must be situated in Subdivision 1, which is the subject of the 1970 deed restrictions. To the extent that defendant argues that owners of property outside of Subdivision 1 have rights under the 1970 deed restrictions, we disagree. Deed restrictions will not be enlarged or extended by judicial construction when there is no ambiguity. *Sampson v Kaufman*, 345 Mich 48, 50; 75 NW2d 64 (1956).

Neither the trial evidence nor the trial court's findings of fact are sufficient to determine, as a matter of law, that defendant owned no real property within the meaning of ¶ 22. Further, as discussed later, we are unpersuaded that plaintiffs demonstrated that their structure complied with all pertinent requirements of the 1970 deed restrictions so as to preclude any injunctive relief. As such, pursuant to our authority to grant relief as the case might require, MCR 7.216(A)(7), we remand this matter to the trial court for additional findings of fact and conclusions of law regarding whether defendant owned real property within the meaning of ¶ 22. The trial court is free on remand to take additional evidence as it deems proper and necessary to decide this issue.

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[2] We reject defendant's claim that it may be characterized as a third-party beneficiary of the 1970 deed restrictions. As a matter of contract law, only intended beneficiaries may enforce a contract. MCL 600.1405; *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003); *Brunsell v Zeeland*, 467 Mich 293; 651 NW2d 388 (2002). One must turn to the contract itself to see whether third-party beneficiary status was granted. *Schmalfeldt, supra* at 428. In this case, we give respect to defendant's status as a separate entity from its members. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). We conclude that the 1970 deed restrictions, as a matter of law, do not grant third-party beneficiary status to defendant or any other homeowners association.

Plaintiffs also challenge the trial court's finding that the structure in their backyard violated ¶¶ 1, 10 and 18 of the 1970 deed restrictions. We find merit to plaintiffs' claim that the trial court erred in finding that ¶ 1 was violated. "Courts will not grant equitable relief unless there is an obvious violation." *Stuart*, *supra*. Because the trial court did not find that the structure was a garage, but only that it could be converted into a garage, the trial court incorrectly concluded that ¶ 1 was violated. Paragraph 1 plainly applies only to garages.

In view of our determination that the trial court erred in finding a violation of ¶ 1, we find it unnecessary to address plaintiffs' waiver and estoppel arguments regarding this provision. Turning to ¶¶ 10 and 18 of the 1970 deed restrictions, we conclude that the trial court erred in finding that plaintiffs violated the architectural control committee provisions by not submitting a request to defendant before building the structure.

The essential holding of *Stuart*, *supra*, is that a would-be enforcer of deed restrictions must establish a breach of that agreement. As in *Stuart*, *supra* at 211, the architectural control committee provisions in ¶ 10 and ¶ 18 were not breached because a properly constituted architectural control committee, as required by ¶ 18, did not exist when plaintiffs built the structure in their backyard.

Hence, we hold that the trial court applied an incorrect legal analysis in concluding that plaintiffs violated the 1970 deed restrictions by not submitting a request to defendant before erecting the structure. Because, as conceded by plaintiffs on appeal, there was evidence and findings made by the trial court to support a conclusion that plaintiffs nevertheless violated ¶ 10 of the 1997 deed restrictions by using the structure for a purpose other than storing garden tools and power equipment, we remand to the trial court to determine what equitable remedy, if any, should be imposed for this use violation.[3]

Finally, because the only obvious violation of the 1970 deed restrictions is a use restriction, we reject plaintiffs' position that they should be deemed to have complied with the 1970 deed restrictions under ¶ 19 of those deed restrictions. Paragraph 19 cannot be reasonably construed as establishing full compliance with use restrictions if suit to enjoin construction is not filed.

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[3] Because a violation of a governmental regulation is not the equivalent of a violation of a deed restriction, at least in those circumstances where the deed restriction contains no provision requiring compliance with governmental regulations, we agree with plaintiffs' position that our Supreme Court's remark in *Stuart*, *supra* at 213, that there is no violation to redress if all governmental regulations are complied with, is dicta. The holding was not essential to our Supreme Court's determination that a violation of the agreement must be established. It is well-settled that statements concerning a principle of law not essential to the determination of a case are obiter dictum and lack the force of an adjudication. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985). Nevertheless, a court of equity may fashion a remedy as warranted by the circumstances. *Three Lakes Ass'n v Kessler*, 91 Mich App 371, 377-378; 285 NW2d 300 (1979). Hence, on remand, the trial court properly may consider plaintiffs' compliance or lack of compliance with governmental regulations when fashioning an appropriate remedy.

In sum, we remand to the trial court for further proceedings regarding its order that plaintiffs either remove the structure in their backyard or submit a plan or request to an architectural control committee that comports with the terms of the 1970 deed restrictions. On remand, the trial court shall make additional findings and conclusions of law with regard to whether defendant had authority under ¶ 22 to enforce the 1970 deed restrictions. If defendant had the requisite authority, the trial court shall also make additional findings of fact and conclusions of law regarding what remedy, if any, should be granted for plaintiffs' use violation. The trial court is free to receive additional evidence, within its discretion, as it deems proper and necessary to decide these issues.

III. 1997 Deed Restrictions

Plaintiffs argue that the 1997 deed restrictions are invalid. We agree. Having considered the various arguments raised by both parties on appeal, we conclude that the trial court clearly erred in finding that proper procedure was followed in amending the 1970 deed restrictions.

We disagree with plaintiffs' position that the 1970 deed restrictions could not be amended until after a period of thirty years pursuant to ¶ 9. To accept plaintiffs' position would render ¶ 24 a nugatory. Courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that renders any part of the contract surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). Plaintiffs' reliance on *Ardmore Park Subdivision Ass'n, Inc v Simon*, 117 Mich App 57; 323 NW2d 591 (1982), is misplaced because that case did not involve multiple amendatory provisions or any dispute concerning the timing of amendment. Rather, the specific question before this Court was whether property owners who did not vote for the amendment could be bound by the amendment. This Court held that "where a deed restriction properly allows a majority, or a greater percentage of owners within a particular subdivision to change, modify or alter given restrictions, other owners are bound by properly passed and recorded changes in the same manner as those contained in the original grant and restriction." *Id.* at 62.

In the case at bar, the 1970 deed restrictions contain separate amendatory procedures in ¶ 9 and 24. They are consistent in terms of excluding ¶ 20 from any amendment, but differ as to voting requirements and the timing of amendments. Paragraph 9 allows for amendments after thirty years by a majority vote. Paragraph 24 allows for amendments without any time restrictions, but requires twenty affirmative votes, which equates to two-thirds of the thirty lots in Subdivision 1. These two provisions do not irreconcilably conflict. Compare *Klapp*, *supra* at 480. Although inartfully drafted, the provisions admit of but one reasonable interpretation, namely, that amendments are permitted at any time so long as the higher vote of twenty lot owners is obtained. See *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 70; 467 NW2d 17 (1991).

Even if ambiguous, we note that there is no relevant trial evidence to aid a trier of fact in determining the intent of the contracting parties. *Klapp*, *supra.* The parties' intent in making a contract should be ascertained by construing it in light of the circumstances existing at the time it was made. *Klever v Klever*, 333 Mich 179, 186; 52 NW2d 653 (1952). Further, there is no practical interpretation by the contracting parties to aid a trier of fact. See *Klapp*, *supra* at 478. At best, there are amendments executed by John Ruggero and his wife in the latter part of 1970 (as one hundred percent owners) and in 1971 (as more than sixty percent owners). Because

plaintiffs are the would-be enforcers of the restrictions in the 1970 deed restrictions, it would be proper to construe the restrictions against plaintiffs. *Stuart*, *supra* at 210. Examined in this context, we find no basis for disturbing the trial court's reliance on ¶ 24 to find that the 1970 deed restrictions were subject to review and revision.

But the trial court clearly erred in finding that defendant followed proper procedure for enacting the 1997 deed restrictions. Pursuant to ¶ 24, "[e]ach lot shall have one vote, twenty affirmative votes are necessary to change provisions of these restrictions." It is clear from the exhibit evidence introduced at trial that the votes recorded to amend the 1970 deed restrictions included votes by lot owners in both Subdivision 1 and Subdivision 2. Because the 1970 deed restrictions only pertain to Subdivision 1, the trial court clearly erred in concluding that the 1997 deed restrictions, which did not receive the approval of twenty lot owners from Subdivision 1, were valid as to Subdivision 1.[4] The votes cast by lot owners in Subdivision 2 could not be counted toward the twenty votes required to amend the 1970 deed restrictions for Subdivision 1.[5]

Because the proper procedure for amending the 1970 deed restrictions was not followed, we find it unnecessary to address the additional arguments raised by the parties on appeal concerning the validity of the 1997 deed restrictions or the injunctive relief granted by the trial court in connection with the 1997 deed restrictions.

In sum, we uphold the trial court's determination that the 1970 deed restrictions could be amended pursuant to the procedure in ¶ 24, but vacate its finding and determination that the 1997 deed restrictions were duly enacted in accordance with that procedure and, therefore, were valid and enforceable. The case is remanded to the trial court for further proceedings consistent with this opinion.

IV. Plaintiffs' Negligence Claim

We decline to address plaintiffs' various arguments on appeal concerning their negligence claim because plaintiffs have insufficiently briefed the summary disposition decision in favor of defendant. *Eldred*, *supra*. However, because it is clear that summary disposition was sought by defendant and granted by the trial court based on the erroneous finding at the bench trial that proper procedures were followed, we vacate the trial court's order of summary disposition and remand for further proceedings consistent with this opinion.

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[4] We express no opinion regarding the amendment of Subdivision 2's 1972 deed restrictions. The case before us only involves the propriety of the amendments for Subdivision 1.

[5] The record is ambiguous as to whether plaintiffs raised in the trial court the specific factual issue regarding whether twenty votes were cast by lot owners in Subdivision 1, as an alternative to their claim that the 1970 deed restrictions could not be amended until after thirty years. But a party need not need not take exception to a trial court's findings or decision. MCR 2.517(A)(7). Hence, we reject defendant's claim on appeal that this issue is not properly before us for consideration.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs pursuant to MCR 7.219(A), neither party having prevailed in full.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Patrick M. Meter